No. 75-1598

In the Supreme Court of the United States

OCTOBER TERM, 1975

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B5) is reported at 528 F. 2d 92. The decision and order of the National Labor Relations Board (Pet. App. A1-A30) are reported at 214 NLRB No. 40.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1975, and the company's petition for rehearing with a suggestion for rehearing *en banc* was denied on February 4, 1976. The petition for a writ of certiorari was filed on May 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that assistant engineers employed on the company's ship were employees rather than supervisors, and thus protected by the National Labor Relations Act from discharge for union activity.

2. Whether the Board properly found that the union authorization cards signed by the assistant engineers were not invalid because of supervisory solicitation.

3. Whether the Board abused its discretion to establish bargaining units in concluding that a unit consisting of engineers and oilers is appropriate.

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), set forth at Pet. App. C1-C2, the following provisions are relevant:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * .

* * * * *

Section 8(a)(3). It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * .

* * * * *

Section 9(b). The Board shall decide in each case, whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * * .

STATEMENT

A. The Board's Findings of Fact

1. Petitioner Company operates the Hughes Glomar Explorer, a large deep-sea exploration vessel. On its maiden voyage in 1973, the vessel's engine department was divided into two separate crews, the A crew and the B crew, each of which served on one leg of the voyage while the other remained at home. Each engine crew consisted of a chief engineer (an acknowledged supervisor), five assistant engineers, and three oilers. (Pet. App. A5-A7.)

Each assistant engineer worked a continuous 12-hour shift each day, which was divided into a 6-hour "watch" shift and a 6-hour "maintenance" shift. The watch shift was spent in the control room; the maintenance shift which followed, in the engine room.[1] An oiler was also assigned to each of the shifts. Thus, four teams, each consisting of one engineer and one oiler,[2] were needed to man the ship's engine department. (Pet. App. A7-A8).

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[1]Since Coast Guard regulations required that a licensed engineer be on watch at all times, when one was in the engine room another was on duty in the control room (Pet. App. A7-A8).

[2]As there were only three oilers on each crew, an assistant engineer performed the duties of the fourth oiler (Pet. App. A8, n. 7).

All of the assistant engineers (five on each crew or a total of 10), whose testimony was not rebutted (Pet. App. A10, n. 9), testified that they had never exercised, or been told that they had, the authority to hire, discharge, discipline, or reprimand the oilers or any other employees; to grant time off, leave, raises, or authorize overtime; or effectively to recommend any of those actions. They did not prepare evaluations, attend staff meetings, or interview prospective employees. The chief engineer alone exercised the final authority with respect to assignments and transfers. (Pet. App. A9-A14.)

On watch shift, virtually all the work performed by the assistant engineer was routine and involved no direction or supervision over the watch shift oiler. The watch engineer spent his time in the control room monitoring various indicators, regulating generators, and making entries in the control room log. The oiler, meanwhile, spent up to five hours of this shift away from the control room making rounds and taking readings, some of which were given to the assistant engineer. In the event of a mechanical malfunction, the watch engineer would ask the engineer on maintenance shift to investigate. If the problem was minor, the maintenance engineer and oiler would try to correct it, but major problems were immediately reported to the chief engineer. (Pet. App. A8, A10.)

On maintenance shift, each assistant engineer was responsible for certain equipment assigned to him by the chief engineer; he performed maintenance on this equipment, completed the necessary unfinished maintenance work of the previous shift, and performed other routine manual work such as painting, sweeping, and cleaning. The oiler on maintenance shift performed similar tasks, working with the assistant engineer. The

chief engineer determined which maintenance jobs required special attention or were to be accorded priority, and passed his instructions on to the maintenance engineer and oiler (Pet. App. A9).

2. In May and June 1973, prior to the initial cruise of the vessel, several meetings took place between representatives of District 1, Pacific Coast District, MEBA, AFL-CIO (the Union), and various of the ship's assistant engineers. Chief Engineers Anthony and Stackhouse attended two of these meetings and signed union authorization cards, but did not solicit signatures from the assistant engineers or otherwise attempt to influence them to sign. By August 10, all 10 assistant engineers had signed union authorization cards. (Pet. App. A17-A20.)

The Company refused the Union's request for recognition based on authorization cards, and, on three occasions in August 1973, interrogated the assistant engineers regarding the Union, threatened to discharge them if they supported the Union, and promised improved benefits if they would abandon the Union. On September 25 and October 1, 1973, when this campaign failed, all 10 assistant engineers were discharged because they continued to support the Union (Pet. App. A21, A23-A24).

B. The Board's Decision and Order

The Board, adopting the decision of the Administrative Law Judge, found, contrary to the Company's contention, that the assistant engineers were employees, rather than supervisors, and that therefore they were protected by the Act from discharge for union activity (Pet. App. A16, A24). Analyzing the actual responsibilities of the engineers, the Board disagreed with the Company that the assistant engineers directed the work of other employees or had significant disciplinary authority over

them (Pet. App. A9-A16). The Board also rejected the Company's assertion that, without reference to their actual duties, "the powers and authority conferred by law on the * * * assistant engineers by reason of their being licensed by the United States Coast Guard is sufficient to classify them" as statutory supervisors (Pet. App. A15).

The Board further found that the assistant engineers and the oilers comprised an appropriate unit for purposes of collective bargaining (Pet. App. A20-A23). It found that the assistant engineers were not professional employees,[3] and that the "community of interest" which they shared with the oilers was sufficient to group them together even if the former were technical employees (Pet. App. A21-A22). Thus, the Board pointed out that (Pet. App. A22):

> The assistant engineers and oilers comprise all of the nonsupervisory employees in the engine department, they work side by side, each assisting the other, and are subject to the same supervision. * * * [T]he oilers and assistant engineers possess many of the same job skills and there is a constant interchange of job functions among some of the oilers and assistant engineers. Except for the period the watch engineer is on duty in the control room, the working conditions of the oilers and assistant engineers are similar, since they work together in the engineroom and related spaces.

[3]In rejecting petitioner's contention to the contrary, the Board noted (Pet. App. A21): "It is clear from the record that the work performed by the assistant engineers, working either as watch engineers, maintenance engineers or oilers, is not 'predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the constant exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning . . . , as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes . . . .' [29 U.S.C. 152(12)(a)] nor was it shown that the chief engineers are professional persons so that working under their supervision would qualify the assistant engineers to become professional employees."

The Board added that, "[a]lthough the [Union] did not request recognition in a unit including the oilers, it is willing to represent them along with the assistant engineers" (*ibid.*).

Accordingly, the Board concluded that in several respects, including the discharge of the assistant engineers for their union activity, the Company had violated Section 8(a)(1) and (3) of the Act (Pet. App. A27). It ordered the Company, *inter alia*, to reinstate with backpay the discharged assistant engineers and to bargain with the Union upon request[4] (Pet. App. A29).

C. The Court of Appeals' Decision

The court of appeals upheld the Board's decision and enforced its order (Pet. App. B1-B5). The court

[4]In issuing a bargaining order, the Board found that the Company's "extensive and flagrant" unfair labor practices precluded any possibility that a fair representation election could be held (Pet. App. A25). The Board rejected the Company's contention that the Union's showing of majority support through authorization cards was tainted by participation in the Union's campaign of the two chief engineers. The Board found that, although the chief engineers did sign authorization cards, they did not participate actively in the campaign and exerted no pressure on the assistant engineers to sign cards (Pet. App. A17-A19).

found the Board's findings of nonsupervisory status to be supported by "substantial evidence" (Pet. App. B4). It pointed out that, "[i]n other circumstances assistant engineers might be supervisors but here we find no error in the Board's findings that the assistant engineers did not possess powers sufficient to warrant their classification as supervisors" (*ibid.*). The court also held that "[t]he record amply supports a finding of the appropriateness of this bargaining unit" (Pet. App. B5).

ARGUMENT

Petitioner in essence challenges the substantiality of the evidence supporting the Board's findings that the assistant engineers were not supervisors, that the oilers and the assistant engineers shared a sufficient community of interest to constitute an appropriate bargaining unit, and that the Union possessed valid authorization cards from a majority of the employees. These issues turn on their particular facts and raise no issue warranting further review by this Court.[5] In the instant case, both the Board (Pet. App. A15-A16 and n. 13) and the court below (Pet. App. B4) noted that in many situations assistant engineers are considered to be supervisors under the Act, but that the engineers in this case possessed none of the indicia of supervisory authority specified in Section 2(11) of the Act, 29 U.S.C. 152(11) (Pet. App. C1).

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[5]The Company's contention (Pet. 12-17) that licensed marine engineers are supervisors *per se* by virtue of maritime law was properly rejected by the Board, since Section 2(11) of the Act, 29 U.S.C. 152(11), establishes the exclusive criteria for determining whether such engineers are supervisors for purposes of the National Labor Relations Act. See *Graham Transportation Co.*, 124 NLRB 960, 962; *Midwest Towing Co.*, 151 NLRB 658, 659; *Globe Steamship Co.*, 85 NLRB 475, 479.

Contrary to the Company's contention (Pet. 13-14), *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31, *Rees* v. *United States*, 95 F. 2d 784 (C.A. 4), and *Peninsular & Occidental Steamship Co.* v. *National Labor Relations Board*, 98 F. 2d 411 (C.A. 5), do not support the proposition that the maritime laws override the provisions of the National Labor Relations Act. These cases merely hold that the statutory right to strike does not give employees aboard ship the right to defy the authority of the vessel's captain and officers in a manner violative of federal statutes prohibiting revolt or mutiny on shipboard. No such conduct occurred here.[6]

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[6]There is no merit to the Company's assertion (Pet. 11) that the Law Judge "did not consider the engineer officers individually by their respective positions in the ship's organization * * * [but rather] simply generalize[d] about the officers as a group * * *." The Law Judge gave detailed reasons for his rejection of the Company's arguments concerning the supervisory status of individual engineers (Pet. App. A10-A15).

Petitioner's further contention (Pet. 25-27) that governmentally imposed requirements of secrecy denied it an opportunity fairly to litigate its case before the Board is not properly before this Court. Petitioner failed to raise that issue in the court of appeals, although the true nature of the Company's mission was disclosed prior to enforcement proceedings in that court. Petitioner is thus foreclosed from raising that issue now. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330. In any event, petitioner has not shown in what respects, if any, its witnesses would have adduced evidence contrary to that already in the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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